



Control Number: 51812



Item Number: 191

Addendum StartPage: 0

PUC PROJECT NO. 51617

OVERSIGHT OF THE ELECTRIC
RELIABILITY COUNCIL OF TEXAS

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PUBLIC UTILITY COMMISSION
OF TEXAS

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PROJECT NO. 51812

ISSUES RELATED TO THE STATE OF
DISASTER FOR THE FEBRUARY 2021
WINTER WEATHER EVENT

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PUBLIC UTILITY COMMISSION
OF TEXAS

**EXELON GENERATION COMPANY, LLC'S MOTION FOR REHEARING OF
MARCH 5 RESETTLEMENT ORDER**

TO THE HONORABLE COMMISSIONERS:

Exelon Generation Company, LLC (“Exelon”)¹ respectfully files this Motion for Rehearing (“Motion”) of a March 5 order of the Public Utility Commission of Texas (“Commission” or “PUC”) denying energy price resettlement during the Winter Storm Uri (“No-Resettlement Order”)² following the Commission’s February 15 and 16 orders (“Feb. 15 and 16 Orders”), which administratively and unlawfully set Electric Reliability Council of Texas, Inc. (“ERCOT”) energy prices at the \$9,000 MWh high system-wide market offer cap (“HCAP”) for nearly four days straight over February 15 – 19, 2021.³ The No-Resettlement Order did not follow

¹ Exelon Generation Company, LLC, through subsidiaries, owns 3,620 MWs of gas-fired capacity and 87 MWs of wind power in Texas. Exelon’s subsidiary, Constellation New Energy, Inc., also provided approximately 14 TWh of competitive retail supply to residential and commercial/industrial load in 2020. Exelon Generation Company, LLC also provides wholesale supply to a number of Texas cooperatives and municipalities.

² The Commission has not issued an order implementing its “No-Resettlement” decision in a manner that complies with the Texas Administrative Procedure Act (see Tex. Gov’t Code § 2001.141). However, as discussed below, during the March 5 Open Meeting, the Commission appeared to finally resolve the question of whether 32 hours of HCAP pricing instituted after firm load shed ceased on February 18 would be resettled. This motion for rehearing is thus filed solely to avoid any potential waiver of Exelon’s right to judicial review.

³ See Oversight of the Electric Reliability Council of Texas, Project No. 51617, Order Directing ERCOT to Take Action and Granting Exception to Commission Rules (Feb. 15, 2021); Project No. 51617, Second Order Directing

191

rulemaking or contested case procedures under the Texas Administrative Procedure Act (“Administrative Procedure Act” or “APA”).⁴ Out of an abundance of caution and to preserve its rights to judicial review, Exelon submits this Motion pursuant to APA § 2001.146 and 16 Tex. Admin. Code § 22.264 to request reconsideration of the No-Resettlement Order.⁵

BACKGROUND

The PUCT’s unlawful February 15 and 16 Orders have wreaked havoc on the ERCOT market. The Commission’s decision to unlawfully and administratively set energy prices to \$9,000/MWh for nearly four days straight in contravention of ERCOT Protocols, Commission rules and the APA is pending motions for rehearing in this docket. Exelon has requested the Commission rescind Section I of its February 15 and 16 Orders in light of the multitude of substantive and procedural deficiencies that underly its decision and restore the energy prices that would have resulted from the proper application of the ERCOT Protocols. Exelon has also requested the Commission open a rulemaking or evidentiary docket to allow market participants that detrimentally relied upon the Commission’s February 15 and 16 Orders to (a) demonstrate their costs that would not be recovered under the pricing generated by the ERCOT Protocols or the losses they incurred by detrimentally relying on the Commission’s Orders, and (b) be made-whole.

Following the February 15 and 16 Orders, the Commission immediately saw the disastrous financial fallout from its interference in the market, which failed to solve the energy shortages

ERCOT to Take Action and Granting Exception to Commission Rules (Feb. 16, 2021). References herein to the “February 15 and 16 Orders” should be read to refer only to the \$9,000/MWh energy price requirement.

⁴ Tex. Gov’t Code §§ 2001.001-.903.

⁵ See Issues Related to the State of Disaster for the February 2021 Winter Weather Event, Project No. 51812, Comments and Motion for Rehearing of Exelon Generation Company, LLC (Mar. 12, 2021). The transcript of the PUCT’s March 5 open meeting is attached as Exhibit A.

during the winter storm. Brazos Electric Cooperative, the largest cooperative in the state, defaulted on approximately \$1.9 billion in liability to ERCOT and filed for bankruptcy. Multiple retail electric providers filed for bankruptcy, and others suffered extreme losses without any reasonable opportunity to hedge the risk of the Commission's abrupt change to the market rules. On February 19, Texas Energy Association for Marketers ("TEAM") filed an Emergency Request to Enforce Commission Order, which requested the Commission instruct ERCOT to remove the administratively set price adders that set prices to \$9,000/MWh from the time firm load shed instruction from ERCOT was reduced to zero on the grid.⁶ On March 4, 2021, the Independent Market Monitor ("IMM") submitted a letter to the Commission similarly recommending the Commission direct ERCOT to correct the real-time prices from 0:00 February 18, 2021, to 09:00 February 19, 2021 to remove the inappropriate pricing intervention that occurred during this time period.⁷ The IMM explained that it was "important that prices *not* reflect [the \$9,000 cap] when the system [was] not in shortage" and no blackouts were being implemented.

On March 5, 2021 — only a day after the IMM's recommendation and in the face of mounting legislative and market pressure to resettle energy prices for the last two days of the winter storm — Chairman Arthur D'Andrea took up the IMM's recommendation in an open meeting and denied the recommendation for correction of real-time energy prices on February 18 and 19. The PUCT refused to act on the real-time energy price recommendation. Citing a desire to give the Intercontinental Exchange, Inc. ("ICE") an answer by 4:00 p.m. that day, Chairman D'Andrea stated:

CHAIRMAN D'ANDREA: And so, you know, we would have to decide that now if we wanted to reprice that, and I'm not inclined to

⁶ Project 51812, TEAM Emergency Request to Enforce Commission Order (Feb. 19, 2021).

⁷ Project 51812, IMM Second Letter to Commissioners (Mar. 4, 2021).

do it today because -- for the reasons I said. I think that, you know, there were -- these prices -- decisions were made about these prices in real time based on information that was available to everybody, to all market participants, and they did all sorts of things that they wouldn't have done if the prices were different. And it's just nearly impossible to unscramble this sort of egg, and the results of going down this path are unknowable.⁸

Chairman D'Andrea went on to state: "I am reluctant to go down this path. We've already set a path."⁹ Commissioner Botkin agreed with him and said, ". . . I think repricing the energy I'm probably more inclined to just -- let's just say, well, we're not going to do that."¹⁰ Chairman D'Andrea then clarified: "But the energy-only thing is the one that -- the energy market is the one that has a deadline today, and I say we don't act."¹¹

The PUC did not adopt a formal motion on the TEAM request and the IMM recommendation, but its actions — i.e., official and intentional inaction, coupled with subsequent private investor discussions and legislative testimony staking out the PUCT's reasons for denying the TEAM/IMM recommendation on the issues appears to be final. For example, the day after the March 5 open meeting, Chairman D'Andrea met with out-of-state investors and promised to put "the weight of the commission" against repricing.¹² In legislative hearings, the Chairman also took the position the PUCT would not support the IMM's resettlement recommendation. In testimony to the House State Affairs Committee on March 11, 2021, Chairman D'Andrea — by that time, the sole remaining PUCT Commissioner — testified that "I've staked out a position on it," and that "one of the deadlines to reprice has passed, and that's really complicated it and made it more

⁸ Exhibit A, PUCT Open Meeting Tr. at 30, line 7 (Mar. 5, 2021).

⁹ *Id.* at 30, line 31.

¹⁰ *Id.* at 31, line 2.

¹¹ *Id.* at 34, line 1.

¹² <https://www.texasmonthly.com/news-politics/wall-street-profited-off-texas-blackouts/>.

difficult.”¹³ He also testified that “I think it would be illegal for me as an agency to reprice, though I think this committee or the legislature, obviously has more freedom to do so.”¹⁴ This testimony from Chairman D’Andrea prompted the Texas Senate, on March 15, 2021, to promptly pass Senate Bill 2142, which would require the PUCT to order ERCOT to correct wholesale power and ancillary services sold in the ERCOT market during the period beginning 11:55 p.m., February 17, 2021 and ending at 9:00 a.m., February 19, 2021.¹⁵ The bill stated that, contrary to the Chairman’s decision, the PUCT “has all necessary authority under Section 39.151(d), Utilities Code” to order the correction. On March 17, 2021, the Texas Attorney General also opined, in response to a request from the Lieutenant Governor, that “ample prior action illustrates the Commission’s use of its general authority” to correct errant prices and that the PUCT generally has such authority under Texas Public Utility Regulatory Act (“PURA”)¹⁶ § 39.151(d).¹⁷

The Commission’s actions and the Chairman’s legislative testimony and discussions made clear to the legislature and the ERCOT market that the PUCT’s March 5 No-Resettlement Order was final, absent legislative intervention. That decision appears to have been intended by the Commission to fix the legal obligations of market participants, despite the failure of the Commission to issue an order in compliance with the Texas Administrative Procedure Act. The PUCT’s action had the effect of denying the IMM’s energy price recommendation and TEAM’s request, which was re-urged on March 22, 2021 and supported by numerous market participants

¹³ Exhibit B, Excerpts From Texas House of Representatives State Affairs Committee Tr. at 2, line 15; at 3, line 5-12 (Mar. 11, 2021).

¹⁴ *Id.*; see also *id.* at 14, line 16 (“... if I do it, I think I get sued and lose right away.”)

¹⁵ Tex. S.B. 2142, 87th Leg., R.S. (2021).

¹⁶ Tex. Util. Code §§ 11.001-66.016.

¹⁷ Tex. Att’y Gen. Op. No. KP-0363 (Mar. 17, 2021).

in various motions and comments.¹⁸ Yet, despite the views of the Senate and the Texas Attorney General, the Commission has not wavered from its March 5 No-Resettlement Order.

Because Exelon’s “right to seek judicial relief should not depend on the vagaries of future governmental action,”¹⁹ and without waiving its motion for rehearing on the February 15 and 16 Orders, Exelon seeks rehearing of the March 5 No-Resettlement Order. The Commission’s decision to change energy pricing in ERCOT on February 15 was in and of itself unlawful and violated procedural and substantive due process for the reasons stated in Exelon’s March 12 motion for rehearing. However, in the event the Commission’s February 15 and 16 Orders are determined to be legally valid, Exelon submits this motion for rehearing on the March 5 No-Resettlement Order. In short, if the Commission has the authority to change ERCOT energy pricing as it did in Section I of the February 15 and 16 Orders (which it does not), the Commission’s No-Resettlement Order was unlawful and not supported by substantial evidence.

LEGAL ANALYSIS AND POINTS OF ERROR

The Commission’s March 5 No-Resettlement Order was issued through an unlawful procedure in excess of the Commission’s statutory authority, did not substantially comply with the Administrative Procedure Act, violated affected parties’ due process rights, and its decision was not in substantial compliance with the APA or reasonably supported by substantial evidence.

¹⁸ Project 51812, TEAM Renewed Request to Enforce Commission Order (Mar. 22, 2021); *see e.g.*, Project 51812, Coalition of Concerned Customers’ Comments in Support of TEAM’s Emergency Request to Enforce Commission Order (Feb. 22, 2021); Petition of Accent Energy Texas, LP to Implement Recommendations of IMM and TEAM (Mar. 4, 2021); Bobcat Bluff Wind, LLC et. al Motion to Reconsider (Mar. 12, 2021); Coalition of Competitive Retail Electric Providers’ Comments in Support of TEAM’s Renewed Request to Enforce Commission Order (Mar. 29, 2021).

¹⁹ *See Texas-New Mexico Power Co. v. Texas Indus. Energy Consumers*, 806 S.W.2d 230, 233 (Tex. 1991) (holding that a final agency order is one: (1) that is definitive, (2) promulgated in a formal manner, (3) with which the agency expects compliance, and (4) that fixes some legal relationship as a consummation of the administrative process.).

A. Point of Error 1: The Commission Failed to Enforce its Own Order.

For the reasons described in Exelon’s motion for rehearing dated March 12, 2021, the Commission’s February 15 and 16 Orders are invalid and should be rescinded. However, if the orders are valid, the Commission is required to enforce them absent undertaking official action to modify the orders. Those orders provided: “*If customer load is being shed*, scarcity is at its maximum, and the market price for the energy needed to serve that load should also be at its highest [a]ccordingly, the Commission directs ERCOT to ensure that *firm load that is being shed* in EEA3 is accounted for in ERCOT’s scarcity pricing signals.”²⁰ There is no dispute that firm load shed ceased around midnight on February 18, yet ERCOT continued to impose HCAP prices until February 19 at 9 a.m.²¹ The prices set during that period of time are thus in direct contravention to the Commission’s order and must be corrected.²² The Commission’s failure to enforce its own order is arbitrary, capricious, and an abuse of discretion.²³

The Commission appears to be greatly concerned with assuring market confidence. Chairman D’Andrea stated that “decisions were made about these prices in real time based on information that was available to everybody, to all market participants”²⁴ It is difficult to conceive of a greater threat to reliance interests than a regulator’s failure to follow its own orders.

²⁰ February 15 and 16 Orders at 1-2 (emphasis added).

²¹ See ERCOT Letter to Hon. Eddie Lucio III dated March 11, 2021 at Exhibit M, p. 3, available at: http://www.ercot.com/content/wcm/lists/227393/ERCOT_Letter_to_Representative_Lucio_3.11.21_PUBLIC_.pdf; ERCOT Market Notices, M-C021521-04, Update: ERCOT Expectations Regarding Exiting EEA3 and Public Utility Commission Emergency Orders Affecting ERCOT Market Prices (Feb. 18, 2021); ERCOT Market Notices, M-C021521-05, Update: ERCOT Expectations Regarding Exiting EEA3 and Public Utility Commission Emergency Orders Affecting ERCOT Market Prices (Feb. 19, 2021).

²² See e.g., *Janek v. Harlingen Fam. Dentistry, P.C.*, 451 S.W.3d 97, 104 (Tex. App.—Austin 2014, no pet.) (State agency commissioners had ministerial duty to enforce prior agency order).

²³ Tex. Gov’t Code § 2001.174(2)(F) (“a court . . . shall reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are . . . arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.”)

²⁴ Exhibit A, Open Meeting Tr. at 30, line 7 (Mar. 5, 2021).

The information available to everyone at the time was that HCAP prices imposed under the orders were conditioned on firm load shed. Without firm load shed, there is nothing in the February 15 or 16 Order or in the ERCOT protocols that would require \$9,000/MWh energy prices. To the extent the orders were valid, the Commission must enforce them and order ERCOT to correct its mistake.

B. Point of Error 2: The No-Resettlement Order Was Made Through Unlawful Procedure Because It Was Not Adopted Under Any Process Set Forth in the Administrative Procedure Act or PURA.

Under the Texas Administrative Procedure Act, state agencies are charged with providing an opportunity for public participation in the rulemaking process and providing an opportunity for hearing and participation in any contested case proceeding that determines the legal rights, duties or privileges of a party.²⁵ PURA § 11.007 provides that the APA applies to proceedings before the PUCT.²⁶ PURA § 39.151(d) gives the PUCT, subject to the due process requirements of the APA, oversight of ERCOT Protocols. PURA § 39.151(d) provides:

The commission shall adopt and enforce rules relating to the reliability of the regional electrical network and accounting for the production and delivery of electricity among generators and all other market participants, or may delegate to an independent organization responsibilities for establishing or enforcing such rules. Any such rules adopted by an independent organization and any enforcement actions taken by the organization are subject to commission oversight and review. An independent organization certified by the commission is directly responsible and accountable to the commission. The commission has complete authority to oversee and investigate the organization's finances, budget, and operations as necessary to ensure the organization's accountability and to ensure that the organization adequately performs the organization's functions and duties.

²⁵ See Tex. Gov't Code §§ 2001.001, 2001.0003(1), 2001.029, 2001.051.

²⁶ Tex. Util. Code § 39.003.

The Commission and ERCOT have adopted rules and Protocols under this statutory authority that were ignored by the PUCT when it issued its No-Resettlement Order.²⁷ In addition to rulemaking and Protocol change procedures, both the PUCT and ERCOT have rules related to resettlement, which the Commission ignored when it decided that it should not reset energy prices after it issued the February 15 and 16 Orders.

The Commission has both the authority and the duty to reset the 32 hours of excessive energy prices, which were imposed in contravention to PURA, the Commission's Rules, valid ERCOT protocols, and the Commission's February 15 and 16 Orders. As set forth in TEAM's Renewed Request to Enforce Commission Order, the notion the Commission lacks the authority to reprice in the face of a pricing error is wrong and inconsistent with PUCT precedent.²⁸ The Commission has such authority under PURA § 39.151(a), 16 Tex. Admin. Code § 25.361(b), and ERCOT Protocols 6.3(4), 6.3(6)(a)(i) and 4.5.3(4). Further, PURA § 39.151(a) and 16 Tex. Admin. Code § 25.361(b) require ERCOT to "ensure that electricity production and delivery are accurately accounted for among the generators and wholesale buyers and sellers" in ERCOT. Pursuant to these statutory requirements, the Commission has repriced in the past.²⁹ If ERCOT's failure to reprice the last 32 hours of the ERCOT market after involuntary firm load shed stopped is properly characterized as a pricing error that resulted in an "invalid market solution" caused by ERCOT,

²⁷ See 16 Tex. Admin. Code § 25.362(c), for example, which provides that ERCOT "shall adopt and comply with procedures concerning the adoption and revision of ERCOT rules." See also Section 21 of the ERCOT Protocols related to the Nodal Protocol Revision Process.

²⁸ See Project 51812, TEAM Renewed Request to Enforce Order at p. 6-10 (Mar. 22, 2021).

²⁹ See, e.g., *See Complaint of Aspire Commodities LLC Against the Electric Reliability Council of Texas*, Docket No. 49763, ERCOT Motion to Dismiss and Response to the Complaint of Aspire Commodities, LP (July 24, 2019); *Complaints and Appeals of DC Energy Texas, LLC and Monterey TX, LLC Against ERCOT* (2021) (consolidated with Docket 50881), Docket 50871, Order (Feb. 12, 2021); *Complaint of TXU Portfolio Management Company LP and TXU Energy Retail Company LP Against ERCOT*, Docket 31243, Order (Aug. 9, 2006); *Complaint of Direct Energy LP and Tenaska Power Services Co Against ERCOT*, Docket 29210, Order (Nov. 5, 2004). See also ERCOT Nodal Protocol Revision Request 474, *Clarification of Price Correction Principles and Associated Timelines* (effective April 1, 2013).

such error could have been corrected without changing existing agency rules or Commission precedent. Indeed, even if the error was the PUCT's fault, not ERCOT's, PURA § 39.151(a) requires that energy and ancillary services are properly accounted for, thereby giving the PUCT, subject to due process requirements of the APA and its rules, authority and the duty to fix its own errors. As such, it would have been squarely within the PUCT's authority under PURA and agency precedent to fix an error that created an invalid market solution by pricing energy at the system wide offer cap after firm load shed in ERCOT due to energy shortages ceased.

To the extent the No-Resettlement Order adopted a new administrative rule and determined the legal rights of market participants without complying with either rulemaking or contested case procedures by ignoring the PUCT's and ERCOT's rule-based authority to correct pricing errors, the Order is unlawful, exceeds the Commission's statutory authority, and should be reconsidered by the Commission, in whole or in part.

C. Point of Error 3: The Commission Failed to Substantially Comply with the Administrative Procedure Act's Rulemaking Procedures and Violated its Own Procedural Rules With Respect to Rulemaking

The Commission must adopt any new administrative rules, as well as amendments to existing rules, pursuant to the rulemaking processes set forth in the APA and the Commission's Procedural Rules.³⁰ The Commission may initiate a rulemaking on its own motion by publishing notice of the proposed rule in accordance with the APA, which requires that public notice be provided at least 30 days prior to adopting the proposed rule and that the proposed rule be filed

³⁰ See generally APA Subchapter B, *Rulemaking*; see also Tex. Gov't Code §§ 2001.003(6) (defining "rule" as including "the amendment or repeal of a prior rule"). We also note that The Governor's February 12 emergency proclamation does not permit the Commission to deviate from the APA. That proclamation provided for the suspension of regulatory statutes, orders or rules of a state agency "upon written approval of the Office of the Governor." There is no record evidence or other indication that Commission requested or obtained written approval of the Governor to suspend the normal operation of the APA before issuing the No-Resettlement Order.

with the Secretary of State for publication in the *Texas Register*.³¹ The Commission must afford all interested persons a reasonable opportunity to submit data, views and arguments in the form of written comments on the rule, and must grant a public hearing if requested by 25 persons, a governmental subdivision or agency, or an association with at least 25 members.³²

A rule is voidable unless a state agency adopts it in substantial compliance with the procedures described above.³³ To the extent the No-Resettlement Order is a “rule” under the APA, it fails to meet this substantial compliance standard. Market participants received no notice of the proposed rule and had no opportunity to submit written comments or participate in a public hearing on its adoption.³⁴ As a result, the rule change directed by the No-Resettlement Order was not adopted in substantial compliance with the Administrative Procedure Act.

The lack of clear process also disrupts market participants’ rights to obtain judicial review. For PUCT rule changes, the normal appellate process is to bring a declaratory judgment action asking a court to determine “the validity or applicability of a rule, including an emergency rule” adopted pursuant to the APA.³⁵ PURA § 39.001(f) further prescribes: “[a] person who challenges the validity of a competition rule must file a notice of appeal with the court of appeals and serve the notice on the commission not later than the 15th day after the date on which the rule as adopted is published in the Texas Register.” In the face of an agency order that failed to clearly follow

³¹ Tex. Gov’t Code § 2001.023; 16 Tex. Admin. Code §§ 22.281(b), 22.282(b).

³² Tex. Gov’t Code § 2001.029; 16 Tex. Admin. Code § 22.282(c),(d).

³³ See Tex. Gov’t Code § 2001.035 (“A rule is voidable unless a state agency adopts it in substantial compliance with Sections 2001.0225 through 2001.34.”).

³⁴ While the Commission can bypass the prior notice and comment requirements of APA §§ 2001.023 and 2001.029 by adopting an emergency rule pursuant to APA § 2001.034 and PUCT Procedural Rule § 22.283, the No-Resettlement Order did not follow the procedural requirements of an emergency rulemaking because it not contain the required finding to support the adoption of an emergency rule, and there has been no publication thereof in the *Texas Register*.

³⁵ Tex. Gov’t Code § 2001.038.

either rulemaking or contested case procedures, it is imperative that the Commission reconsider the No-Resettlement Order in light of the potentially serious consequences thereof.

The Appellee brief of the Texas Attorney General in opposition to Luminant Energy Company LLC's direct appeal to the Third Court of Appeals from the No-Resettlement Order demonstrates these serious consequences.³⁶ In that brief, the Appellee took the position that, if the PUCT's No-Resettlement Order could be characterized as an agency action, it represented an order, not a rule, and therefore should be processed as an "order" or "decision" under 16 Tex. Admin. Code 22.251(o), and result in a "final decision in a contested case" under the APA, not a competition rule, a conclusion that would require parties to exhaust their administrative remedies by filing timely motions for rehearing.³⁷ The ambiguity in the No-Resettlement Order therefore allows the agency to play a game of procedural "gotcha" in an effort to stave off appeal of agency actions that clearly were outside the scope of the agency's authority and rules.

D. Point of Error 4: The Commission Violated APA § 2001.051 and its Own Procedural Rules With Respect to Contested Cases, Acted in Excess of Its Statutory Authority, and Followed an Unlawful Procedure

To the extent that the Commission's No-Resettlement Order is properly characterized as a final decision in a contested case, it also violated applicable statutes and rules related to contested cases. A state agency may issue a final order affecting the rights of parties in a contested case proceeding conducted in accordance with the APA. Nonetheless, the Commission's issuance of the No-Resettlement Order was not preceded by any of the essential features of a contested case; there has been no opportunity for interested parties to participate in a hearing or to respond and

³⁶ *Luminant Energy Company LLC v. Pub. Util. Comm'n of Texas*, No. 03-21-00126-CV, On Direct Appeal from the Public Utility Commission of Texas PUC Project No. 51617, Opposition to Luminant Energy Co.'s Emergency Motion to Stay Rule and to Expedite Consideration of Motion and Appeal (Mar. 21, 2021).

³⁷ *Id.* at 5. See APA § 2001.171.

present evidence and argument, each of which are required under APA § 2001.051 and PUCT rules. No factual record was developed to support the decisions made in the No-Resettlement Order. Nor did the No-Resettlement Order contain the required elements of a final order in a contested case, as it does not include “findings of fact and conclusions of law, separately stated.”³⁸ Nor did the No-Resettlement Order issue in a Commission docket styled as a contested case, but rather it was filed in a “project” dockets with the caption, “Oversight of the Electric Reliability Council of Texas.” As such, the Commission violated APA § 2001.151 by issuing an order that affects Exelon’s and others’ rights without providing the right to participate in a hearing or present evidence and argument, and in doing so the Commission exceeded its statutory authority as a state agency and instead followed an unlawful procedure when it issued the No-Resettlement Order.

E. Point of Error 5: The No-Resettlement Order Violates the Due Process Rights of ERCOT Market Participants, Who Have a Right to Comment and Hearing, or at a Minimum, to Judicial Review, and is Not Reasonably Supported by Substantial Evidence

As explained above, the Commission did not follow the procedures set forth in the Administrative Procedure Act in issuing the No-Resettlement Order. Exelon and other generators, retail electric providers, marketers and cooperatives that were detrimentally impacted by the Commission’s decision had no opportunity to comment on that decision, no opportunity for a hearing, and no opportunity to present evidence or arguments. In addition, the right of affected parties to seek judicial review of the Commission’s No-Resettlement Order has been fundamentally jeopardized because the Commission has neither clearly issued a final, appealable order nor has it properly promulgated a new rule, leaving parties to guess what process they can follow to obtain review of the Commission’s actions.

³⁸ Tex. Gov’t Code § 2001.141 (b); 16 Tex. Admin. Code § 22.263(2).

Procedural due process “at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner” before a person can be deprived of a vested property interest.³⁹ Property interests protected by due process include, at the very least, ownership of money.⁴⁰ By denying Exelon and others the opportunity to provide written comments or arguments prior to issuing the No-Resettlement Order, and by now impairing their right to judicial review in acting outside of any authorized procedure, the Commission has violated those parties’ right to procedural due process.

Moreover, the Commission’s decision is not reasonably supported by substantial evidence because there is no record evidence to suggest that the Commission considered the substantial impact that changing its resettlement rules would have on other market participants or the basis for its decision. At the March 5 open meeting, Chairman D’Andrea cited to a false 4:00 p.m. ICE deadline as the basis for his decision on the No-Resettlement Order. However, the Commission took no actual evidence on this issue, and, as set forth in TEAM’s Renewed Request to Enforce Commission Order, concerns related to the ICE deadline appear to have been unfounded and contradictory to published ICE regulations.

ICE later demonstrated that it could delay settlement of its financial process for contracts tied specially to ERCOT settlement prices, at its convenience, and it did so with respect to contracts relating to ancillary services in a March 8, 2021 market notice.⁴¹ As the notice indicated, ICE rules grant it considerable discretion to delay final settlement pricing of futures contracts and to correct settlement pricing of futures contracts pursuant to ICE Futures US (“IFUS”) Trading Rule 4.34. IFUS Trading Rule 4.34(b)(v) provides:

³⁹ *Mosley v. Texas Health & Hum Servs Comm’n*, 593 S.W.3d 250, 265 (Tex. 2019) (internal quotation omitted).

⁴⁰ *Matzen v McLane*, 604 S.W.3d 91, 113 (Tex. App.—Austin, 2020).

⁴¹ https://www.theice.com/publicdocs/futures_us/exchange_notices/ICE_Futures_US_Ancillary_Contracts_Notice_2021308.pdf?utm_source2=ICE_Futures_US_Ancillary_Contracts_Notice_2021308

ICE Futures US (IFUS) Trading Rules permit [ICE] to delay issuing a final Settlement Price at its discretion if, for any reason, it believes there is an error in the calculation of the index or other value on which final settlement of any futures contract is based. It can thereafter publish a final Settlement as soon thereafter as practicable using such pricing data as it deems reliable, unless otherwise specified in the rules of the relevant futures contract.

ICE also had discretion to determine settlement prices for futures contracts. IFUS Trading Rule

4.34(b)(iv) provides:

If [ICE] concludes that a Settlement Price as determined by the averaging method specified by the IFUS Rules does not fairly represent the market value of the relevant futures contract delivery or expiration period relative to the Settlement Price of any other delivery or expiration period, or is inconsistent with market information known to [ICE], then [ICE] may set the Settlement Price for such period at a level consistent with such other Settlement Prices or market information including the settlement prices for similar contracts trading on other markets, trading activity in the spot, OTC and swap markets, forward prices, pricing data obtained from OTC and swap market participants, and any other pricing data from sources deemed reliable by [ICE].

ICE rules also indicate it can cancel trades that take place at an “unrepresentative price” as invalid. For example, IFUS Trading Rule 4.29 provides:

If [ICE] determines that a trade has taken place at an unrepresentative price, [ICE], at its absolute discretion, may declare such trade invalid. [ICE] may take into account such information as it deems appropriate when determining whether to invalidate a trade, including, without limitation, the following:

(A) price movement in other delivery or expiration months of the same Exchange Commodity Contract;

(B) current market conditions, including levels of activity and volatility;

(C) time period between different quotes and between quoted and traded prices;

(D) market or other information regarding price movement in related Commodity Contracts;

(E) manifest error;

(F) proximity of the Trade to the close of the ETS trading session.

Finally, ICE's Error Trade Policy confirms that "The Rules . . . provide [ICE] with absolute discretion to delete orders, adjust prices, cancel trades or suspend the market in the interests of maintaining a fair and orderly market." It also states: "In normal circumstances, [ICE] will only adjust prices or cancel trades on the basis that the price traded is not representative of market value. Any trade where the only error is the number of contracts traded and not the price at which they are traded, will not be subject to cancellation. [ICE] will make the final decision on whether a trade price is adjusted, or a trade is cancelled or is allowed to stand."

Even if ICE's trading policies were relevant to the Commission's determination, which Exelon disputes, ICE had broad discretion to delay final settlement pricing or correct settlement pricing pursuant to its rules. However, the Commission apparently did not have the benefit of this information at the time it made its No-Resettlement Order, thereby demonstrating the danger of what happens when an agency ignores the due process requirements of the APA and PURA. The result is that agency reached a decision that materially harmed Exelon and other market participants and that was unsupported by substantial evidence. The No-Resettlement Order also violates the substantive due-course-of-law protection provided in Article I, Section 19 of the Texas Constitution because its effects are so burdensome as to be oppressive in light of the governmental interest served.⁴² In refusing to resettle market prices due to its own misinterpretation or willful ignorance of its lawful re-pricing authority, the PUCT has forced ERCOT market participants to bear extraordinary prices that are clearly oppressive.

⁴² See *Patel v. Texas Dep't of Licensing & Regul.*, 469 S.W.3d 69, 87 (Tex. 2015).

CONCLUSION

As set forth in Exelon's initial motion for rehearing on the February 15 and 16 Orders, the Commission's decision to administratively set energy prices at the market cap of \$9,000 per MWh was unlawful. Similarly unlawful was its decision in the No-Resettlement Order asserting that it either would not or could not correct resulting settlement errors in market prices. The Commission should reconsider its decision in the No-Resettlement Order.

For the foregoing reasons, Exelon respectfully requests that the Commission:

(1) Rescind Section I of its February 15 and 16 Orders in light of the multitude of substantive and procedural deficiencies that underly its decision and restore the prices that would have resulted from the application of the ERCOT Protocols, and, alternatively, adopt the TEAM/IMM proposal for energy prices; and

(2) Open a rulemaking or evidentiary docket to allow market participants that detrimentally relied upon the Commission's February 15 and 16 Orders to (a) demonstrate their costs that would not be recovered under the pricing generated by the ERCOT Protocols or the losses they incurred by detrimentally relying on the Commission's February 15 and 16 Orders, and (b) be made-whole.

Exelon further requests that even if the Commission declines to reconsider its substantive decision amending the ERCOT Protocols, that it reissue the No-Resettlement Order to clarify under what legal authority it has acted.

Exelon also requests all other relief to which it may be entitled.

Respectfully submitted,

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On behalf of Exelon Generation Company, LLC

CERTIFICATE OF SERVICE

I certify that notice of the filing of this document was provided to all parties of record via electronic mail on March 30, 2021, in accordance with the Order Suspending Rules, issued in Project No. 50664.

/s/ Lynda Fohn
Lynda Fohn

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
PUBLIC UTILITY COMMISSION OF TEXAS
AUSTIN, TEXAS

OPEN MEETING
FRIDAY, MARCH 5, 2021
(Via Webcast)

BE IT REMEMBERED THAT AT approximately 9:32 a.m., on Friday, the 5th day of March 2021, the above-entitled matter came on for hearing at the Public Utility Commission of Texas, 1701 North Congress Avenue, William B. Travis Building, Austin, Texas, Commissioners' Hearing Room, before ARTHUR C. D'ANDREA, CHAIRMAN, and SHELLY BOTKIN, COMMISSIONER; and the following proceedings were reported remotely by computerized stenotype machine by Janis Simon, Certified Shorthand Reporter.

1	TABLE OF CONTENTS	
2		PAGE
3	PROCEEDINGS, FRIDAY, MARCH 5, 2021	8
4	PUBLIC COMMENT	8
5	WATER	
6	AGENDA ITEM NO. 1	
7	DOCKET NO. 48571; SOAH DOCKET	
8	NO. 473-19-2460.WS - APPLICATION	
9	OF THE CITY OF SAN MARCOS TO	
10	AMEND A SEWER CERTIFICATE OF	
11	CONVENIENCE AND NECESSITY IN	
12	HAYS, GUADALUPE, COMAL, AND	
13	CALDWELL COUNTIES	CONSENTED
14	AGENDA ITEM NO. 2	
15	DOCKET NO. 49263 - APPLICATION	
16	OF THE CITY OF FLORESVILLE TO	
17	AMEND A WATER CERTIFICATE OF	
18	CONVENIENCE AND NECESSITY IN	
19	WILSON COUNTY	14
20	AGENDA ITEM NO. 3	
21	DOCKET NO. 49871 - PETITION OF	
22	THE CITY OF RED OAK INDUSTRIAL	
23	DEVELOPMENT CORPORATION TO	
24	AMEND ROCKETT SPECIAL UTILITY	
25	DISTRICT'S WATER CERTIFICATE	
	OF CONVENIENCE AND NECESSITY	
	IN DALLAS AND ELLIS COUNTIES	
	BY EXPEDITED RELEASE	14
	AGENDA ITEM NO. 4	
	DOCKET NO. 49923; SOAH DOCKET	
	NO. 473-20-1673.WS - APPLICATION	
	OF CORIX UTILITIES (TEXAS) INC.	
	TO IMPLEMENT FEDERAL TAX	
	REDUCTION CREDIT RIDERS	15

1	TABLE OF CONTENTS (CONTINUED)	
2		PAGE
3	AGENDA ITEM NO. 19	
4	DISCUSSION AND POSSIBLE ACTION	
5	REGARDING IMPLEMENTATION OF	
6	STATE AND FEDERAL LEGISLATION	
7	AFFECTING ELECTRICITY MARKETS	
8	INCLUDING CURRENT AND PROJECTED	
9	RULEMAKING PROJECTS, COMMENTS	
10	TO OTHER STATE AND FEDERAL	
11	AGENCIES AND COMMISSION PRIORITIES	NOT HEARD
12		
13	GENERAL	
14	AGENDA ITEM NO. 20	
15	PROJECT NO. 2 - DOCUMENT FILING	
16	OF OPEN MEETING TRANSCRIPTS AND	
17	MINUTES	19
18	AGENDA ITEM NO. 21	
19	PROJECT NO. 51715 - RULEMAKING	
20	CALENDAR	NOT HEARD
21	AGENDA ITEM NO. 22	
22	PROJECT NO. 51812 - ISSUES	
23	RELATED TO THE STATE OF	
24	DISASTER FOR THE FEBRUARY	
25	2021 WINTER WEATHER EVENT	20
26	AGENDA ITEM NO. 23	
27	DISCUSSION AND POSSIBLE ACTION	
28	REGARDING AGENCY REVIEW BY	
29	SUNSET ADVISORY COMMISSION,	
30	OPERATING BUDGET, STRATEGIC	
31	PLAN, APPROPRIATIONS REQUEST,	
32	PROJECT ASSIGNMENTS,	
33	CORRESPONDENCE, STAFF REPORTS,	
34	AGENCY ADMINISTRATIVE ISSUES,	
35	AGENCY ORGANIZATION, FISCAL MATTERS	
36	AND PERSONNEL POLICY	NOT HEARD

1 (Long pause)

2 PHONE MODERATOR: Mr. Breitkreutz, could
3 you please press 1 followed by 0?

4 (Brief pause)

5 PHONE MODERATOR: And, Mr. Breitkreutz,
6 your line is open.

7 MR. BREITKREUTZ: Are they ready for my
8 question?

9 MR. JOURNEAY: Yes, sir.

10 PHONE MODERATOR: Yes, sir.

11 MR. BREITKREUTZ: Hello. My name is Billy
12 Breitkreutz. I'm an electrical engineer. I have a
13 master's thesis is generation control. I've engineered
14 several power plants, and I have a couple of questions
15 concerning I guess your Agenda Item 18.

16 The first question: I see back in 2014
17 the Brattle Group provided a study for the PUC in which
18 they considered ERCOT's current energy-only versus a
19 capacity market. They comment -- in the report it was
20 stated specifically implementing a capacity market would
21 reduce the risks associated with potential low
22 reliability in high-cost events providing net benefits
23 overall. Will the PUC consider changing the ERCOT
24 market to a capacity market?

25 And my second question that I have, during

1 the winter event, did any generating company charge
2 higher prices than normal for some generators while they
3 had other generators offline? If so, that would be
4 quite unethical, I think. So, that's all I have. Thank
5 you.

6 CHAIRMAN D'ANDREA: Thank you, sir, for
7 your questions. This is Arthur D'Andrea. I'll give
8 Shelly a chance to address them, too, if she wants to.
9 I want to take them in the opposite order. The --

10 MR. JOURNEAY: We should just take
11 comment, sir.

12 CHAIRMAN D'ANDREA: Okay. Well, I
13 think -- I agree with you, Stephen; typically, it's
14 comments, but I think depending on -- if it gets out of
15 hand, we can shut it down. But I do think we owe the
16 public explanations, and some of this stuff is -- it's
17 extraordinary. So, I'm going to -- I agree with you;
18 ordinarily, we should do it that way, but I'm going to
19 run with it.

20 So, in opposite order, the second thing
21 you described, it would be unethical. And in our little
22 corner of the world we call it withholding, and it's an
23 abuse of market power. And we're still looking at that,
24 obviously, sir. But we -- you know, if it gives you
25 comfort, we have something called an independent market

1 monitor, which are a bunch of PhD economists that we
2 have on contract, and their job is to look for this.
3 Their job is to make sure generators don't do what
4 you've just described. And if they do do that, the
5 independent market monitor brings us that stuff and we
6 bring enforcement actions against them. So, we don't
7 know yet, but if it happened, it's going to get fixed.

8 The capacity market question is more
9 complicated. It's -- you know, that has been a debate
10 in these halls and in the Legislature for a long time.
11 Capacity markets are expensive, and there are other
12 ways -- if you're going to spend a lot of money, there
13 are other ways to make sure that things like what
14 happened two weeks ago didn't happen. We could pay
15 for -- you know, we could make gas plants go to dual
16 fuel and keep storage on site, for instance, and that's
17 also expensive -- cheaper than in a capacity market.
18 So, it is one way that might fix this.

19 My personal view, right now, anyway -- and
20 this is subject to change -- is that a capacity market
21 would not have helped us here. And I'll leave you with
22 this: We've got -- you know, our reserve margins, our
23 winter reserve margins going into this storm were
24 43 percent, which means we had 43 percent more
25 generation than we thought we would need, which is --

1 you know, a capacity market would have seen that and
2 said, you don't need anymore, and so our problem wasn't
3 capacity. Our problem is that our capacity went poof
4 all at once, and we lost half of it.

5 And if we had had a capacity market, we
6 would have -- maybe you would have one or two more
7 plants, but those plants also would have gone offline.
8 So, I think our problem was more physical than
9 market-based. But, again, we're still investigating
10 what went wrong, and I'm open to change my mind.

11 COMM. BOTKIN: Yeah, I don't really have
12 anything to add. I appreciate the public willing to
13 participate and give us comments, and so thank you for
14 calling in this morning.

15 CHAIRMAN D'ANDREA: Yeah, thank you very
16 much.

17 Anybody else, Collin?

18 PHONE MODERATOR: Yes, sir. We'll go to
19 the line of Gary Cunningham.

20 Your line is open.

21 MR. CUNNINGHAM: Thank you.

22 And thank you for hearing my comments this
23 morning. So, there are hundreds of thousands, if not
24 millions, of meters within Texas which do not measure
25 interval data. They are called scalar meters within the

1 industry, and they might have been interrupted during
2 the outage. And, yet, the billing process that's in
3 place by most of the utilities would still allocate some
4 usage to them across the entire month and across the
5 entire billing period. Has the PUC considered
6 instructing the utilities to zero out the usage during
7 the interruptions and known interruption period for each
8 meter to avoid customers' unduly seeing charges for
9 consumption during periods which they had no electricity
10 service?

11 CHAIRMAN D'ANDREA: I don't know the
12 answer to that, but I will look into this issue that
13 you've just raised. And we'll have Staff take a look,
14 so thank you for bringing it to our attention.

15 MR. CUNNINGHAM: Thank you for your time.

16 PHONE MODERATOR: And, once again, if
17 there are any comments, it is 1 then 0.

18 (Brief pause)

19 PHONE MODERATOR: And, Mr. Chairman, there
20 are no comments at this time. Please continue.

21 CHAIRMAN D'ANDREA: Thank you very much,
22 Collin.

23 Stephen, could you please take us through
24 the Consent Agenda?

25 MR. JOURNEAY: Good morning,

1 COMM. BOTKIN: Agreed.

2 CHAIRMAN D'ANDREA: Okay. Item 21 is not
3 taken up.

4 AGENDA ITEM NO. 22

5 PROJECT NO. 51812 - ISSUES
6 RELATED TO THE STATE OF
7 DISASTER FOR THE FEBRUARY
8 2021 WINTER WEATHER EVENT

8 CHAIRMAN D'ANDREA: Item No. 22, Docket
9 51812, okay. I -- we have a lot of things to talk about
10 here.

11 So, first, I want to do some cleanup from
12 two days ago. You know, I think last time we talked
13 about allowing -- you know, we're still going to --
14 well, it's my view that we still keep the disconnect --
15 no disconnect order in place.

16 COMM. BOTKIN: Uh-huh.

17 CHAIRMAN D'ANDREA: But we were going
18 to -- but, because the REPs can get charged late fees,
19 we were going to start allowing them to pass on the late
20 fees and also charge them. So, do you agree to --

21 COMM. BOTKIN: Yeah.

22 CHAIRMAN D'ANDREA: Right. And so I think
23 we -- I think we agreed last time, but now we need an
24 order. So, I move to adopt an order that rescinds our
25 order suspending late fees on delinquent bills charged

1 by retail electric providers to their residential and
2 small business customers effective today.

3 COMM. BOTKIN: Agreed.

4 CHAIRMAN D'ANDREA: Thank you.

5 MR. JOURNEAY: Is that in this project?

6 MS. CORONA: Yes.

7 CHAIRMAN D'ANDREA: Okay. We have a
8 similar thing with water late fees. Their wholesalers
9 also charge them late fees, and so I think it's probably
10 time to -- you know, while no one can disconnect it,
11 it's probably time to allow that -- those to pass
12 through. So, if you agree, I move to adopt an order
13 that rescinds our order suspending late fees on
14 delinquent bills charged by retail water and sewer
15 utilities to their residential and small business
16 customers effective today.

17 COMM. BOTKIN: Agreed.

18 CHAIRMAN D'ANDREA: Thank you, Shelly.
19 The LCAP project, have you -- I was thinking -- we were
20 talking about opening up a project to move -- to have a
21 discussion and invite discussion on this. Are you still
22 open to that?

23 COMM. BOTKIN: So, you've probably heard
24 the same feedback I have that, you know -- about a lot
25 of these topics about, you know, do we take some time to

1 deliberate and get feedback, or do we need to give
2 people certainty right now. And so I'm open to it, and
3 I'm not saying we have to say today what we think our
4 opinions are, but I am sympathetic a little bit to the
5 argument of like people just want to know what to
6 expect. And so that's all I came with today.

7 CHAIRMAN D'ANDREA: Yeah, I agree with
8 you. I think that one thing we can do here while we
9 move through this is provide some calm and steadiness,
10 and I think, also, importantly, to kind of be very
11 straightforward about what's on our mind and why we're
12 making the decisions we're making.

13 COMM. BOTKIN: Yep.

14 CHAIRMAN D'ANDREA: Because I know -- I
15 mean, we usually try to do that, but sometimes it's
16 easier to kind of say less. But I think for something
17 like this it's worth saying more, and I agree with you
18 the market needs certainty. I'm not sure we can provide
19 that entirely since right now we're discussing all sorts
20 of market changes --

21 COMM. BOTKIN: Right.

22 CHAIRMAN D'ANDREA: -- in a very public
23 way in the Legislature. And so, you know, we can only
24 do so much. There may be some changes. So, I am a
25 little torn, but I would like to have it open just to

1 discuss for now.

2 COMM. BOTKIN: Have a place for it, yeah.

3 CHAIRMAN D'ANDREA: And if we need to shut
4 it down, we can. Like you -- well, I shouldn't say,
5 "like you." I'm not inclined to mess with it. I think
6 I would like to let it run as our rule said and let it
7 be 2,000 over the summer, but I don't want to have
8 regrets later --

9 COMM. BOTKIN: Uh-huh.

10 CHAIRMAN D'ANDREA: -- because I don't
11 know. I've heard advocacy against doing that, but I
12 haven't really heard the other side.

13 COMM. BOTKIN: Uh-huh.

14 CHAIRMAN D'ANDREA: And we made a lot of
15 decisions in the last couple weeks that had to be made
16 kind of under the gun at the last second. And I --
17 where it's possible to get back to a more deliberative
18 mode --

19 COMM. BOTKIN: I agree.

20 CHAIRMAN D'ANDREA: -- I'd like to do
21 that --

22 COMM. BOTKIN: Me, too.

23 CHAIRMAN D'ANDREA: -- because our
24 standard style is, you know, people actually file their
25 comments officially before the Commission, and we read

1 them and decide, not, you know, whoever has my cell
2 phone number can call me hours before a meeting. And,
3 you know, that's not the ideal way to make decisions.
4 So, if you agree, I'd like to open a project to discuss,
5 you know, what to do with the LCAP. Should we leave it
6 as written, eliminate the link to the fuel index price,
7 eliminate the hard dollar cap, or raise the cap.

8 COMM. BOTKIN: Uh-huh.

9 CHAIRMAN D'ANDREA: And I think that, you
10 know, if we were to act, it would have to be quickly.
11 And so I think we should ask for comments by March 26th,
12 please.

13 COMM. BOTKIN: Actually, that's a good
14 point. But the fuel price thing, I heard, you know,
15 some testimony and questions from Senators yesterday
16 about, you know, at minimum we probably need to do
17 something different there. So --

18 CHAIRMAN D'ANDREA: Uh-huh.

19 COMM. BOTKIN: -- so to the extent we're
20 going to do something in this project, that for sure
21 seems like something we need to look at.

22 CHAIRMAN D'ANDREA: I agree with that.

23 COMM. BOTKIN: Yeah.

24 CHAIRMAN D'ANDREA: Yeah, that needs to be
25 fixed. And so, you know, if we can -- it's a small fix.

1 This disaster exposed a lot of small things we need to
2 fix with our markets -- big and small -- and we might as
3 well get this one done.

4 COMM. BOTKIN: Yeah.

5 CHAIRMAN D'ANDREA: Okay. TDU cold load
6 pickup. I assume you know as much about this as I do.

7 COMM. BOTKIN: Yep.

8 CHAIRMAN D'ANDREA: Okay. So, I think
9 it's worth doing. I think it's a good proposal by the
10 TDUs. So, this is -- for people who aren't -- who
11 didn't get the memo out there, this is -- in some TDU
12 tariffs there's a provision which adjusts their demand
13 charges or rate class of commercial consumers based on
14 their highest -- their peak demand on any given month.
15 And during the cold weather two weeks ago, a lot of
16 commercial customers had big spikes in demand because of
17 the cold load pickup issue, which is -- you know,
18 there's a huge spike right when the load comes on, and
19 that's caused spikes in their bills. And the TDUs
20 pointed this out to us, and I think it's worth fixing.

21 So, if you agree, I'd like to issue an
22 order for the periods of February 15th to February 19th
23 directing TDUs to adjustment downward billing demands in
24 bills sent to retail electric providers, eliminate the
25 demand reading for demand ratchet calculations, remove

1 demand readings from rate reclassifications, and reverse
2 actions related to invoicing ratchets or
3 reclassification.

4 COMM. BOTKIN: Agreed.

5 CHAIRMAN D'ANDREA: Okay.

6 MR. JOURNEAY: Just to point out that we
7 had prepared a draft order to grant these requests and
8 circulated with y'all just before this meeting and that
9 that's the one we will bring you for signature.

10 CHAIRMAN D'ANDREA: I've reviewed it, and
11 I like it. Thank you.

12 COMM. BOTKIN: Thank you.

13 CHAIRMAN D'ANDREA: Okay. The next thing
14 I want to discuss is something you brought up last time,
15 Shelly, and that's -- I've had an opportunity to talk a
16 little bit about it. I think it makes a lot of sense to
17 think about extending the invoice -- settlement invoice
18 dispute timelines at ERCOT.

19 COMM. BOTKIN: Sure.

20 CHAIRMAN D'ANDREA: So --

21 COMM. BOTKIN: I never circled back with
22 them. So, I don't know if they have a proposal, or if
23 you do. I mean, whatever --

24 CHAIRMAN D'ANDREA: I don't know. They're
25 still working on -- you know, I talked to Chad, and he

1 definitely thinks it's added some uncertainty. And
2 people are -- you know, this is not a good time for
3 uncertainty, but he's still trying to figure out exactly
4 what the right timelines are. So, I think we can just
5 ask Staff to work with ERCOT on the issue and develop an
6 order that -- develop some kind of order and bring it to
7 us at our March 11 Open Meeting.

8 COMM. BOTKIN: Okay.

9 CHAIRMAN D'ANDREA: But just to flag to
10 market participants, that was -- this is addressing the
11 problem of settlement invoices, ADR timelines. And we'd
12 like to -- you know, there was some uncertainty as to
13 whether the deadline is really short or long, and I
14 think we want the longer one.

15 COMM. BOTKIN: Yeah.

16 CHAIRMAN D'ANDREA: I'm forgetting the
17 numbers now, but I think we want to give you more time
18 to get this done.

19 Okay. Let's see. We have from the IMM
20 this morning a request for clarification on our order --
21 our clawback order that we issued two days ago.

22 COMM. BOTKIN: Uh-huh.

23 CHAIRMAN D'ANDREA: The clarification
24 makes sense to me.

25 COMM. BOTKIN: Yeah, I'm fine with it,

1 also. Yeah.

2 CHAIRMAN D'ANDREA: Okay.

3 So, then, in that case, I -- Stephen, do
4 we need a motion, or could you just -- direct you to add
5 this to our order? How does that work?

6 MR. JOURNEAY: So, I think you should move
7 to adopt a new order that reflects this ordering
8 paragraph to super -- and to rescind our previous --

9 CHAIRMAN D'ANDREA: Okay.

10 MR. JOURNEAY: -- supercede it with this
11 one.

12 CHAIRMAN D'ANDREA: Okay. I move we
13 supercede our previous order with an order that includes
14 this clarifying paragraph from the IMM.

15 COMM. BOTKIN: Second.

16 CHAIRMAN D'ANDREA: Thank you. Okay. I
17 think I just have one last thing here, and I kind of
18 saved it for last because it's, for me, at least the
19 biggest. And that's -- you know, we've got a bunch of
20 repricing requests from the IMM. And I -- you know, I
21 think these are difficult decisions, and they always
22 have been.

23 You know, back in the good old days when
24 our repricing disputes were for, you know, tens of
25 millions of dollars, I didn't like repricing then

1 because it upset settled expectations and because we
2 have no idea what's -- you know, we just see the tip of
3 the iceberg. We don't see all the hedges and stuff
4 beneath the surface, and so you don't know who you're
5 hurting.

6 COMM. BOTKIN: Uh-huh.

7 CHAIRMAN D'ANDREA: And, you know, you
8 think you're protecting the consumer, and it turns out
9 you're -- you know, you're bankrupting a co-op or a
10 city.

11 COMM. BOTKIN: Uh-huh.

12 CHAIRMAN D'ANDREA: And so it's dangerous
13 to do -- you know, after something is run to go around
14 and redo it. So, that's sort of my baseline. But, you
15 know, the IMM raised some good points, and I think
16 they're very interesting. And so we definitely should
17 consider them.

18 But, you know, at least on -- I mean,
19 putting aside the ancillary service repricing request,
20 I -- that, I think we don't have to act on.

21 COMM. BOTKIN: Uh-huh.

22 CHAIRMAN D'ANDREA: The IMM's one about
23 repricing that last day of -- repricing the energy
24 market --

25 COMM. BOTKIN: Uh-huh.

1 CHAIRMAN D'ANDREA: -- you know, it's my
2 understanding that ICE needs an answer -- would -- you
3 know, if -- unless we wanted to really disrupt the ICE
4 markets, they need a deadline -- their deadline is today
5 at 4:00.

6 COMM. BOTKIN: Uh-huh.

7 CHAIRMAN D'ANDREA: And so, you know, we
8 would have to decide that now if we wanted to reprice
9 that, and I'm not inclined to do it today because -- for
10 the reasons I said. I think that, you know, there
11 were -- these prices -- decisions were made about these
12 prices in real time based on information that was
13 available to everybody, to all market participants, and
14 they did all sorts of things that they wouldn't have
15 done if the prices were different. And it's just nearly
16 impossible to unscramble this sort of egg, and the
17 results of going down this path are unknowable.

18 I mean, I know on the surface it looks
19 like, oh, no, it's just money that generators got. And
20 if you reverse it, it will go to the consumers. But
21 that is very simplistic, and it's not how it works.

22 And if you pay attention who's advocating
23 for and against this, you'll see that because there are
24 people representing consumers on both sides of these
25 questions. There are people looking out for consumers

1 who don't want us to reprice, and there are a lot of
2 consumers that could be hurt by repricing. And the
3 reason for that is very complicated, but it's mostly got
4 to do with a bunch of private arrangements and
5 transactions that happen outside of the market. And
6 those -- there are a lot more of those than there are
7 transactions in the market.

8 And so, because of that, I am reluctant to
9 go down this path. We've already set a path. We know
10 who could -- who it looks like who was hurt by that, and
11 we can focus on helping the people that were hurt
12 instead of focusing -- instead of, you know, throwing
13 everything up in the air, again, creating another huge
14 mess. And then, you know, a month from now we'll have a
15 different set of people that are hurt, and we have to
16 focus on helping them.

17 COMM. BOTKIN: Uh-huh.

18 CHAIRMAN D'ANDREA: So, that's sort of
19 where I'm at, but I acknowledge it's a very difficult
20 call.

21 COMM. BOTKIN: Agreed. Completely agree.
22 Yeah, I know we've had a lot of filings, you know,
23 supporting this or that action. And I know that every
24 time we don't act on something, that that is -- you
25 know, it causes uncertainty. Right?

1 CHAIRMAN D'ANDREA: Uh-huh.

2 COMM. BOTKIN: And so I would not want to
3 say that I would never -- well, you know, I think
4 repricing the energy I'm probably more inclined to
5 just -- let's just say, well, we're not going to do
6 that. The ancillary services one, you know, I could get
7 there. But on the other hand, kind of for the same
8 reasons, you know, like you could argue, well, if you're
9 okay with repricing, then just do all of it, or if
10 you're against it, then, you know --

11 CHAIRMAN D'ANDREA: Uh-huh.

12 COMM. BOTKIN: -- don't do any of it. So,
13 anyway, I do think we should acknowledge that we got --
14 I mean, obviously, there's a lot of feedback in the
15 Senate testimony yesterday and State Affairs. But do
16 you want to mention the letter?

17 CHAIRMAN D'ANDREA: Yes, absolutely.

18 COMM. BOTKIN: Okay.

19 CHAIRMAN D'ANDREA: I was definitely going
20 to do that. We did get a letter from Senator Springer
21 addressing this issue, and I'm so grateful for
22 legislative feedback on these questions because I
23 don't -- you know, as I know you've said to them a bunch
24 and I've said to them over and over again, you know, on
25 this question right now, you know, I -- we need to be

1 just standing shoulder to shoulder with them. There
2 cannot be any daylight between us, and that's
3 communication. That's me calling them until they're
4 sick of hearing from me and them sending letters like
5 this because, you know, we just have to -- you know --
6 and, in fact, I don't really intend to -- you know, on
7 my part, I don't intend to make any huge decisions
8 without talking to all of them first --

9 COMM. BOTKIN: Uh-huh --

10 (Simultaneous discussion)

11 CHAIRMAN D'ANDREA: -- and so --

12 COMM. BOTKIN: -- I think that's wise.

13 CHAIRMAN D'ANDREA: -- you know, and
14 that's kind of where I stand. So, I appreciate this
15 comment, and I hope what I have said today sort of
16 addresses why I'm reluctant to reprice. I don't
17 think -- I totally get how it looks like you're
18 protecting consumers, but I promise you, you're not.
19 And if you don't believe me, you know, call around, and
20 you'll see.

21 COMM. BOTKIN: Uh-huh. Uh-huh. Okay.

22 CHAIRMAN D'ANDREA: Okay. I think that's
23 all I have, but I -- so, just to clarify, I'm with you.
24 Let's -- the ancillary service thing is different.
25 There's no deadline for that. We don't have to -- we

1 can kind of put that on hold. But the energy-only thing
2 is the one that -- the energy market is the one that has
3 the deadline today, and I say we don't act.

4 COMM. BOTKIN: Uh-huh.

5 CHAIRMAN D'ANDREA: Okay. Perfect. Do
6 you have anything else, Shelly?

7 COMM. BOTKIN: I do not.

8 CHAIRMAN D'ANDREA: Okay.

9 Stephen, are we good? Oh, boy. You're
10 scowling at me.

11 (Laughter)

12 MR. JOURNEAY: I'm trying to be deliberate
13 here, sir, and not open my mouth too soon. (Laughter)
14 I don't think I have anything else to bring to you.

15 CHAIRMAN D'ANDREA: Okay. Do you --
16 should we adjourn, or should we recess?

17 MR. JOURNEAY: The only reason I talked to
18 you about that was the filing -- getting the filing.
19 So, we got it, and we've done -- we've acted on that.
20 So, I think we're good to adjourn if that's what you
21 want to do.

22 CHAIRMAN D'ANDREA: Okay.

23 COMM. BOTKIN: I mean, if y'all need a
24 minute to think about it, we can recess for 10-15
25 minutes --

1 MR. JOURNEAY: No. No, the recess was
2 simply the IMM filing --

3 COMM. BOTKIN: Okay.

4 MR. JOURNEAY: -- getting it filed this
5 morning --

6 COMM. BOTKIN: Okay.

7 CHAIRMAN D'ANDREA: Okay.

8 MR. JOURNEAY: -- and so it's here.

9 CHAIRMAN D'ANDREA: Okay. Well, with
10 that, this meeting of Public Utility Commission of Texas
11 is adjourned.

12 (Proceedings adjourned: 9:59 a.m.)
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C E R T I F I C A T E

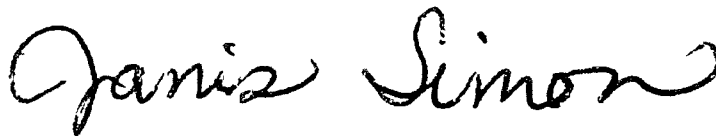
STATE OF TEXAS)

COUNTY OF TRAVIS)

I, Janis Simon, Certified Shorthand Reporter in
and for the State of Texas, do hereby certify that the
above-mentioned matter occurred as hereinbefore set out.

I further certify that I am neither counsel
for, related to, nor employed by any of the parties or
attorneys in the action in which this proceeding was
taken, and further that I am not financially or
otherwise interested in the outcome of the action.

Certified to by me this 8th day of March, 2021.



Janis Simon
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TRANSCRIPTION OF VIDEO RECORDING
HOUSE STATE AFFAIRS COMMITTEE
EIGHTY-SEVENTH LEGISLATIVE SESSION
AUSTIN, TEXAS

EXCERPT OF:
TESTIMONY OF ARTHUR D'ANDREA, CHAIRMAN OF PUC

THURSDAY, MARCH 11, 2021

Transcribed by: Melinda M. Walker, CSR, RPR, CMRS

1 REP. PADDIE: Members, before proceeding
2 with the rest of the bills on today's agenda, we will
3 hear from Chairman Arthur D'Andrea to discuss the most
4 recent emergency measure from the governor. So the
5 Chair would ask the chairman to come up.

6 You know the drill. Please state your name
7 and who you represent.

8 MR. D'ARTHUR: Yes, sir. Good morning,
9 Chair, members of the committee. My name is Arthur
10 D'Andrea. I am the chair of the Public Utility
11 Commission of Texas.

12 I'm here to talk about repricing, the issue
13 that's come up, but before I get started, I want to let
14 you know that this is a hard issue. And although I've
15 staked out a position on it, I commit to you today that
16 I will try my very best to put that aside and to just
17 serve as a resource witness to help you figure out the
18 pros and cons of this decision that's before you.

19 And that's not actually going to be very
20 hard for me to do because I've flip-flopped on this
21 issue several times, and my chief of staff actually
22 flip-flopped on it twice on the same phone call. So my
23 heart is open to both sides of this debate, and so, you
24 know, I think I can really help you through this.

25 And before I just stand ready to answer

1 questions, let me say, you will hear three things from
2 me today in answering your questions. One is repricing
3 doesn't really help consumers or hurt consumers, with
4 one exception that I'll go into.

5 The other thing is one of the deadlines to
6 reprice has passed, and that's really complicated it and
7 made it more difficult. And I'm happy to talk about
8 that.

9 And the third is, I think it would be
10 illegal for me as an agency to reprice, though I think
11 this committee or the legislature, obviously, has more
12 freedom to do so.

13 So, with that, I will stand ready to answer
14 your questions. I'm sure you have a lot.

15 REP. PADDIE: All right. I'm sure some of
16 the members have questions, but thank you for being here
17 today. I think it's important for us, as I know a lot
18 of folks have already kind of made up of their mind as
19 to where they are on this, but I think as it is the case
20 with anything that comes before us, we need to be very
21 deliberative before we proceed and make sure we
22 understand all the facts and the consequences, frankly,
23 of some of the things that we might do.

24 And so I want to run just a few key points
25 that I think everyone is hearing, including the public.

1 Can we do this? I have some questions about whether or
2 not we have the legal and regulatory authority to even
3 do this. And if we decide we are going to when you
4 have -- and please speak to this -- I mean, how much of
5 this you have -- all of this is settled already and
6 settled in some areas that, frankly, is outside -- out
7 of the purview of ERCOT anyway. So help me understand
8 how you would even begin to do this if we make the
9 decision to do this.

10 MR. D'ANDREA: Yeah, that's a great
11 question. You know, as I said before, I don't think I
12 have the legal authority to do it. I think this
13 legislature -- no matter what, we're getting sued, okay,
14 probably in either direction so maybe that's not an
15 exaggeration.

16 But, you know, if I do it, I think I get
17 sued and lose right away. If the legislature does it,
18 it's a closer question because now you don't have -- you
19 guys can sweep aside the ERCOT protocols. You're not
20 bound by our rules or any of that, but there's still the
21 more -- the four-year constitutional questions, and you
22 know, I have not dug deeply enough into that except to
23 say that, you know, you will get sued, and it will be a
24 close call if the legislature reprices.

25 So this last question you asked about --